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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1965

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC.), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Argument	8
Reasons relied on for allowance of the writ	8
I. The Judgment entered in the Lawlor Case is not binding on Petitioner because Petitioner was not a Party in that Case	8
II. The Lawlor Case adjudicated only that the Plaintiffs therein had failed to prove the Fact of Loss, or Injury to their Business or Property, and not that the Plaintiffs had failed to prove a Conspiracy to violate the antitrust Laws	9
A. Analysis of the Lawlor Findings of Fact	10
III. The Judgments of the Court below distort the Law of Judgments beneficially to practiced Monopolists, and therefore in the Public Interest the Judgments should be reversed in order that the Merits of this treble-damage antitrust suit may be heard and determined by a Jury	15
Conclusion	21
Appendix A—Opinion of the District Court	22
Appendix B—Opinion of the District Court and Order Denying Motion for Reconsideration	26

TABLE OF CONTENTS—*Continued*

Page

Appendix C—Opinion of the Court of Appeals for the Fifth Circuit 28

Appendix D—Judgment of the Court of Appeals for the Fifth Circuit 29

Appendix E—Opinion of the District Court in re National Screen Service Corp. 30

TABLE OF CASES CITED

Interstate Circuit v. United States, 306 U. S. 226 (1939) 12

Lawlor v. National Screen Service, 211 F. 2d 934 (Cir. 3, 1954) 16

Lawlor v. National Screen Service, 349 U. S. 322 (1955) 5, 8, 17

Lawlor v. National Screen Service, 352 U. S. 992 (1957) 21

Lawlor v. National Screen Service Corp. 270 F. 2d 146 (3 Cir. 1959) 9

Matter of N. Y. State L. R. Bd. v. Holland, 294 N. Y. 480 (1945) 8, 16

National Screen Service v. Poster Exchange, Inc., 305 F. 2d 647 (5 Cir. 1962) 20

Postal Tel-Cable Co. v. Newport, 247 U. S. 464 (1918) 8

United States v. National Screen Service, et al., Civ. Action No. 75-138 S. D. N. Y. (1957) 18

United States v. Paramount Pictures, 334 U. S. 131 (1948) 21

Vogelstein v. National Screen Service, 204 F. Supp. 591 (1962) 15

TABLE OF STATUTES CITED

Page

Act of Congress approved July 2, 1890, c.647 §§1, 2, 26 Stat. 209 (Sherman Act) 3, 19

Act of Congress approved October 15, 1914, c.323, 38 Stat. 730 (Clayton Act) 3, 4

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The Poster Exchange, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 22, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court, dated July 2, 1963 (R.90) is unreported, but is reproduced in Appendix A, *infra* 22. The District Court's opinion denying petitioner's motion for reconsideration, dated August 30, 1963 (R.97) is reproduced in Appendix B, *infra* 26. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 340 F. 2d 320, and is reproduced in Appendix C, *infra* 28; and the judgment entered by the Court of Appeals is reproduced in Appendix D, *infra* 29.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (R.177) was entered on January 22, 1965, and the filing date of this petition is less than ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a plaintiff in a private treble-damage antitrust suit can be barred by a judgment that was entered in another suit involving a different and wholly unrelated plaintiff.

2. If the judgment in the earlier suit was entered solely on the ground that the plaintiff had failed to prove the fact of loss, can the judgment be used in a later suit as an adjudication that the defendants had not conspired to violate the federal antitrust laws?

STATUTES INVOLVED

This case is based on §§1 and 2 of the Act of Congress of July 2, 1890, c.647, 26 Stat. 209 (15 U.S.C. §§ 1 and 2) entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, and on §4 of the Act of Congress of October 15, 1914, c.323, 38 Stat. 730 (15 U.S.C. §15) entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act.

Section 1 of the Sherman Act, *supra*, (15 U.S.C. §1) provides, in pertinent part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal . . ."

Section 2 of the Sherman Act, *supra*, (15 U.S.C. §2) provides as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, *supra*, (15 U.S.C. §15) provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defend-

ant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Federal Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the provisions of §4 of the Act of the Congress known as the Clayton Act, *supra*, (15 U.S.C. §15).

Description of the Parties

Petitioner (plaintiff-appellant below) is a corporation engaged in the business of servicing motion picture exhibitors with supplies of advertising posters, known as "standard accessories", in the motion picture district of Atlanta, Georgia, which covers parts of four southern states.

National Screen Service Corporation (hereinafter "National Screen"), which is one of the defendants named in the complaint, is engaged in the same business as petitioner, but on a national scale, and it competes with petitioner in the Atlanta area.

The respondents are five major motion picture distributors who produce the accessories that petitioner and National Screen distribute.

History of the Case

Petitioner's amended complaint (R.35) charges respondents and National Screen with conspiring to monopolize the business of distributing standard accessories on a national scale. The facts averred may be briefly summarized as follows (R.35, *et seq.*):

When petitioner began doing business, in 1941, it was able to buy, and did buy, ample supplies of standard acces-

sories directly from the respondents; during the 1940's each respondent gave to National Screen an exclusive license to obtain and distribute standard accessories anywhere in the United States; after these exclusive licenses were granted, it became necessary for petitioner to obtain its supplies from National Screen or to go out of business; for several years National Screen made some supplies available to petitioner, but the quantity was inadequate and the price too high; on February 15, 1961, National Screen notified petitioner—and all others in like position—that after May 16, 1961, no more supplies would be made available; the said exclusive license agreements contained profit-sharing provisions, and National Screen's decision to cut off supplies was made with the approval of respondents; petitioner has been injured and damaged in the amount of $100,000.00, and unless respondents are restrained from continuing to conspire petitioner will have to go out of business because of lack of supplies of stock in trade (Amended Complaint, R.35[1]).

It is not contended that these averments, taken at face value, do not allege a cause of action under sections 1 and 2 of the Sherman Act.

The respondents, however, (but not the defendant National Screen) jointly filed in the District Court a motion for summary judgment (R.81) based on grounds *not* including res judicata, whereupon the District Court (Morgan, J.) ignoring all the grounds formally alleged,[2] granted the motion, and entered summary judgment for respondents, on the basis of res judicata, but without referring to the doctrine of res judicata by name.

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[1] Additional facts are stated in "Plaintiff's Pre-Trial Statement," Supp. R.1 through 36; and a summary of the main facts appears in the Court's opinion in *Lawlor v. National Screen Service*, 349 U.S. 322 (1955).

[2] Since the court ignored these grounds, and since petitioner also regards them as devoid of merit, no further reference will be made to them in this petition, but if respondents attempt to rely upon them, petitioner will ask leave to submit a reply brief.

Specifically, the District Court, in its opinion, said (R. 90, Appendix A, *infra* 22):

"Substantially the same charge as is here made was made in the case of *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U.S. 922, in which the instant defendants, United Artists Corporation and Paramount Film Distributing Corporation, were also defendants. It seems to this Court that this *Lawlor* case is particularly significant in that the Third Circuit reviewed the historical origin of the motion picture distributor's relationship with National Screen and found absolutely no evidence of conspiracy. . . .

"Also strongly significant, in that it constitutes persuasive authority in this case, is the decision rendered by Judge Luongo in *Vogelstein v. National Screen Service Corporation*, 204 F. Supp. 591, in which the Court granted a summary judgment to the defendants sued therein in an action substantially similar to the case at bar. Because of a stipulation between the parties that any decision in *Lawlor* as to the existence of a conspiracy or monopoly would be dispositive of the conspiracy and monopoly questions in the other cases, the earlier claim by Vogelstein had been dismissed. . . . The defendant's motion for summary judgment was granted, with Judge Luongo, in the Vogelstein case, making the following statements concerning the *Lawlor* case:

> 'It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those

> issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.'
>
> "Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope."

Accordingly, the District Court, on December 10, 1963, entered a final appealable judgment (R.98) which, on January 22, 1965, was affirmed in a per curiam opinion by the United States Court of Appeals for the Fifth Circuit (R.175, Appendix C, *infra* 28), and judgment was entered on the same day [3] (R.177, Appendix D, *infra* 29).

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[3] In the meantime, viz, on January 31, 1964, National Screen also filed a motion for summary judgment, and on February 24, 1965, the District Court granted this motion and entered judgment for National Screen. The District Court's opinion is reproduced in Appendix E, *infra* 30. On March 15, 1965, petitioner appealed from the entry of this judgment to the United States Court of Appeals for the Fifth Circuit, and that appeal is now pending.

ARGUMENT

Reasons Relied on for Allowance of the Writ

I. THE JUDGMENT ENTERED IN THE LAWLOR CASE IS NOT BINDING ON PETITIONER BECAUSE PETITIONER WAS NOT A PARTY IN THAT CASE.

Petitioner had no connection with the *Lawlor* case, and therefore the judgment entered in that case cannot be used to prevent petitioner from obtaining a hearing on the merits of its case: *Postal Tel-Cable Co. v. Newport*, 247 U.S. 464 (1918); *Matter of N.Y. State L.R. Bd. v. Holland*, 294 N.Y. 480 (1945).

Thus, in *Postal Tel-Cable Co. v. Newport, supra* (247 U.S. at page 467), the Court said:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citing cases). The opportunity to be heard is an essential requisite of due process of law in judicial proceedings (citing cases). And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citing cases) so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

And in *Matter of N.Y. State L.R. Bd. v. Holland, supra* (294 N.Y., at pages 493-4), the court said:

> "The fundamental principle governing the general doctrine of res judicata is that a party shall not be heard a second time on an issue which he has once been called upon and permitted to try and contest. . . . It is . . . a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger. . . . every person is entitled to contest once an issue of fact or of law which affects his rights. A decision on such issues in favor of a party cannot relieve him from the burden of proving the facts again and of again convincing the court of the soundness of his position when that position is challenged by a stranger to the original contest."

The aforementioned views of the District Court are manifestly irreconcilable with these basic authorities.

II. The Lawlor Case adjudicated only that the Plaintiffs therein had failed to prove the Fact of Loss, or Injury to their Business or Property, and not that the Plaintiffs had failed to prove a Conspiracy to violate the Antitrust Laws.

The *Lawlor* case was tried to the court without a jury. The trial judge (Kraft, J.) entered 140 findings of fact and 12 conclusions of law (R.115), but wrote no opinion. No finding dealt specifically with the issue of conspiracy or monopoly but, as will be seen, many of the findings, and conclusions, did deal specifically with failure of proof of the fact of loss.[4]

The closest that the trial judge came to ruling on the

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[4] The judgment entered by Judge Kraft was affirmed in *Lawlor v. National Screen Service Corp.*, 270 F. 2d 146 (3 Cir. 1959). The opinion of the Court of Appeals contains many statements of fact and conclusions of law which are totally unjustified by anything contained in the trial judge's findings and conclusions. All of the material findings, favoring either side, are referred to in this petition.

issues of conspiracy and monopoly appears in his conclusions of law 3, 4, 5 and 6 which are quoted below (R.170):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."
>
> "5. The plaintiffs are not persons injured in their business or property within the meaning of Section 4 of the Clayton Act by reason of any action or conduct of any of the defendants."
>
> "6. The plaintiffs failed to show any damage sustained by them as a result of any action or conduct of any of the defendants."

None of the *findings* dealt expressly with the issues of monopoly or conspiracy, but a few of them may be thought to deal with those issues by inference. In the following analysis, therefore, all of the relevant and material findings are referred to.

A. *Analysis of the Lawlor Findings of Fact.*

(1)

The court found that at various times from 1940 to 1947 National Screen obtained from each of the then existing eight major motion picture distributing corporations an "exclusive" license to obtain and distribute the standard accessories produced by it to advertise its pictures (Findings 36, 39, 63, 75, 81, 88, 101 and 107, R.126 *et seq.*)

The dates of execution of these exclusive license agreements are of some significance, and they are therefore listed below in chronological order:

Name of Licensor[5] *(Abbreviated)*	*Effective Date of Contract*	*Finding*
Paramount	Feb. 1, 1940	36
RKO	Feb. 1, 1940	39
MGM	March 1, 1942	63
Universal	Aug. 1, 1944	75
Columbia	May 1, 1945	81
United Artists	March 1, 1946	88
Warner Bros.	April 15, 1946	101
20th Century-Fox	June 30, 1947	107

(2)

The court found that the reason why the film companies granted these licenses was that although it was the practice of the motion picture distributors to require exhibitors to pay a price for standard accessories the revenue received was usually, if not always, much less than the cost of production.[6] (Findings 32, 38, 62, 74, 80, 87, 100 and 106, R. 124, *et seq.*)

(3)

The court found that the reason why the licenses were made "exclusive" was as follows (Finding 35, R.125):

> "35. The opening of new exchanges throughout the country required National Screen to assume leasehold and other obligations and required an investment involving millions of dollars. To protect its investment, National Screen in its negotiations with Paramount

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[5] All of these licensors are respondents herein except RKO, Universal and Columbia.

[6] The record shows that all of these license agreements contained a provision requiring National Screen to pay a share of its profits to the licensors (R.39; Supp. R.12) and this, of course, had the effect of enabling the licensors to derive a net profit from the business of distributing their own advertising. (See, for example, Finding of Fact 62, R.135.)

Pictures, Inc. required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five year term."

(4)

With respect to the question of collaboration among respondents the court found, with respect to Paramount, for example, as follows (Finding 37, R.126):

> "37. Neil Agnew, who was Vice-President of Paramount Pictures, Inc. in charge of sales, a member of its board of directors, and responsible for the distribution of accessories at the time the Paramount Pictures, Inc. standard accessory contract was entered into recommended the negotiation of that contract and carried on the negotiations for it. Neither Mr. Agnew nor any one under his direction or supervision consulted or conferred with any executives or representatives of any other film producing or distributing company with respect to the question whether the contract should be made. The decision did not depend upon the action of any other company with respect to a similar contract or arrangement. The decision was based solely upon the business interests of Paramount Pictures, Inc."

Substantially the same finding was made with respect to the other seven licensors (Findings 40, 64, 76, 82, 89, 102, and 108, R.128, *et seq.*)

No other findings were made in this connection, and it is quite certain that the findings made are ineffectual insofar as absolving the licensors on the charge of conspiracy is concerned:—*Interstate Circuit v. United States*, 306 U. S. 226 (1939).

(5)

The court found that "During the period of time commencing February 1, 1940 and ending August 1, 1940, Ad-

vertising Accessories Inc., a predecessor corporation of National Screen, acquired by purchase the businesses of twenty-eight poster renters who had been conducting their business in twenty-two different cities of the United States . . . (Finding 42, R.128).[7]

(6)

The court found that following the grant of the third of the said exclusive licenses (that by Loew's, in 1942) Lawlor and his partner brought an antitrust action against Paramount, RKO, Loew's and National Screen, and that, in 1943, that action was settled by an agreement in which National Screen agreed that it would, under a sub-license, provide Lawlor with adequate supplies of the accessories produced by Paramount, RKO, and Loews, and also accessories for the pictures of any other film distributor from whom it might thereafter obtain a similarly exclusive license (Findings 69, 70 and 71, R.137-138).

(7)

The court found that throughout the six year period of time involved in the suit (August 1943 to 1949) National Screen faithfully complied with its sub-license agreement and thus provided Lawlor with full supplies of all the accessories that he said he wanted (Finding 73, R.139).

Specifically, with respect to the accessories of the five film distributors that granted exclusive licenses after the making of the aforesaid sub-license agreement, the court found, for example, in the case of Universal as follows (Finding 79, R.141):

> "79. Upon obtaining the license to produce, by causing to be manufactured, and to distribute standard accessories for motion pictures of Universal Pictures

[7] There is much other evidence on the record tending to show that the combination herein complained of was conceived with the specific intent of eliminating competition: Supp. R.4 through 7, and 25.

Company, Inc., National Screen advised the plaintiffs of the license and of the availability to the plaintiffs of standard accessories produced by National Screen for Universal Pictures, pursuant to the sub-license agreement. The plaintiffs thereupon and during the entire period in suit ordered and received their requirements of Universal standard accessories for National Screen. Thereafter, plaintiffs acquired from National Screen, rather than from the local exchange of Universal Film Exchanges, Inc., all of the plaintiffs' requirements of Universal standard accessories.

Substantially the same finding was made with respect to the accessories of the other four film distributors in this category (Findings 85, 92, 105 and 111, R.141, *et seq.*)

(8)

The court found that National Screen charged Lawlor such low prices that they were actually less than the prices that he had been required to pay the film distributors when he acquired his supplies directly from them (Findings 128, 129, R.165).

(9)

The court found that as a result of the foregoing, Lawlor continuously made more and more money. For example, the court found that (No. 122, R.163):

"122. During the period in suit, i.e., from 1943 to 1949, plaintiffs' business was progressively more successful, with increased volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year between 1943 and 1949."

(10)

The court specifically found that Lawlor had suffered no loss at any time during the period in suit. This mani-

festly important finding is quoted below in full (No. 138, R.169):

> "138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

In contrast with the foregoing, the record in this case shows that National Screen never granted petitioner's requests for a sub-license (Supp. R.16) and has at all times determined "the quantity of said accessories available to . . . petitioner, and the prices to be charged . . ." (R.23), and that "The Poster Exchange Inc. has always paid National Screen top prices." (R.23), with the result that petitioner has suffered damage and injury in the estimated amount of $100,000.00 (R.46).

It is clear, therefore, that petitioner has been most unjustifiably wronged by the ruling that it is barred by the judgment entered in the *Lawlor* case from obtaining a hearing, by court and jury, on the merits of its own case.

III. The Judgments of the Courts below distort the Law of Judgments beneficially to practiced Monopolists, and therefore in the Public Interest the Judgments should be reversed in order that the Merits of this treble-damage antitrust Suit may be heard and determined by a Jury.

More important than the injustice done the petitioner, however, is the fact that the judgments of the courts below are based on a concept of the law of judgments which is most revolutionary and undesirable.

As has been seen, the district judge (Morgan J.) after quoting from the opinion filed by the district judge in the *Vogelstein* case, (*Vogelstein v. National Screen Service*, 204 F. Supp. 591 (1962)) concluded that (R.93, Appendix A, *infra* 24):

> "Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope."

If that statement of the law is allowed to stand it will, of course, result in the obliteration of the fundamental rule that the res judicata effect of a judgment binds no one other than the parties to the suit in which the judgment is entered.

If the statement stands, all that a national monopolist need do is to get a single district court judge to decide a single case in his favor and he will be well along on the road to being able to operate his nefarious practices without fear of being interfered with by a judgment of any other court anywhere in the nation.

For it must be remembered that the principle of res judicata provides support for bad judgments as well as good ones. As stated by Lehman, C.J., in *Matter of N. Y. State L. R. Bd. v. Holland, supra*, 294 N. Y. 480, 493 (1945):

> "It has been said that within the field in which the principle is applied it 'renders white that which is black, and straight that which is crooked. Facit excurro rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy' Jeter v. Hewitt et al., 22 How. U. S. 352, 364, 16 L.ed. 345."

And it can be asserted on the basis of the highest authority that those who are disposed to violate the federal antitrust laws are very adept in distorting them, and in misleading at least some judges to acquiesce in the distortions.

For instance, in 1955 these same respondents, in a case involving this same conspiracy, succeeded in obtaining a holding by a court of appeals[8] that the res judicata effect of a judgment in their favor extends even to a *consent* judg-

[8] *Lawlor v. National Screen Service*, 211 F. 2d 934 (Cir. 3, 1954).

ment, entered without findings, and involving a period of time different from that involved in the later suit. This ruling, however, was reversed by this Court and in the course of reversing it this Court said (*Lawlor v. National Screen Service, supra*, 349 U. S. 322 (1955)):

> "We granted certiorari because of the importance of the question thus presented in the enforcement of the federal antitrust laws (349 U. S. at 326)
>
> * * * * *
>
> "There is no merit . . . in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata" (349 U. S. at 329).

It is self-evident that in the present instance these same respondents are bent upon obtaining for themselves even a much greater immunity from civil liability for future violations. As has been seen, respondents are charged with operating a conspiracy national in scope, and adversely affecting many persons. There has been only one trial on the merits, the *Lawlor* trial, which was to a judge without a jury, and which turned on the finding that the plaintiff therein failed to prove damage or injury to his business. Now respondents are attempting to use the judgment entered in that case as a bar against all others seeking relief, whether or not injured in their business. The question is whether the respondents will prove to be ingenious enough to succeed in carrying out so ambitious a program. Up to now they have indeed succeeded, and only by intervention of this Court can they be stopped.

More fully, up to now the respondents have succeeded in bringing about the following described twistings or evasions of the antitrust laws in furtherance of the instant conspiracy.

First, reference is made to the case of *United States v. National Screen Service, et al.*, Civil Action No. 75-138 S. D. N. Y. (1957). In that case the Government sued to break up the conspiracy and monopoly involved in the instant case, and the Complaint[9] filed by the Government was very full and complete, and called loudly for the entry of a strong decree. Unfortunately, however, the respondents were able to induce the Government's representatives to agree to the entry of a consent decree the terms of which were far too weak to do any good. Specifically, the decree purported to outlaw the practice of making exclusive license agreements, and the respondents were ordered to grant a distribution license to any qualified applicant. On the face of it that seemed to be helpful, but when it came time to define the word "qualified" the decree provided, in section V (B) that (R.19):

> "No Producer Defendant shall be required to regard any person as a qualified applicant . . . unless (1) The applicant . . . has a national distribution organization and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service . . ."

As beforesaid (*Supra* 11) in *Lawlor* the court found that the reason why National Screen asked for and got exclusive license privileges was that National Screen was obliged to expend "millions of dollars" in setting up its national distribution organization (Findings 34, 35, R.125).

Since respondents are now prohibited from granting any more exclusive licenses, it seems certain that no new-

[9] Supp. R.28, *et seq.*

comer millionaire [10] would be inclined to consider investing his millions in the setting up of a national distribution organization to compete against National Screen's long entrenched monopolistic position.

The net effect of the consent decree therefore, was to make more secure the position of the conspirators. Indeed, the record shows that National Screen and the respondents actually have been so bold as to use the decree in the courts as a document officially justifying and validating the national monopoly that they are now so boldly operating. As has been seen, the conspirators got out of the 1942 suit by their agreement that National Screen would sell supplies to its competitors, but there was nothing in the consent decree to compel National Screen to continue to do this. Realizing this, National Screen has served notice that it will sell no more supplies to competitiors, and has advanced the consent decree as authority for its position (R.50, bottom to R.53, bottom), and the complaint alleges that this action was taken "with knowledge, acquiescence and approval on the part of the respondents" (R.42-3).

Secondly, the pre-history of this case also demonstrates the extraordinary degree to which respondents have twisted and distorted the antitrust laws.

This case was commenced in 1961 against National Screen alone on the theory of a violation of section 2 of the Sherman Act (R.1). National Screen moved for summary judgment on the basis of the consent decree, and on the *Lawlor* third conclusion of law, which, to repeat, was as follows (R.170):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."

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[10] Needless to say, there is nothing on this record tending to show that petitioner possesses any such amount of wealth, or that anyone has applied for a license to compete.

The district judge (Morgan, J.) denied the motion and on appeal the judgment was affirmed: *National Screen Service v. Poster Exchange, Inc.*, 305 F. 2d 647 (Cir. 5, 1962).

In its opinion, the Court of Appeals paid scant attention to the consent decree, and, more importantly, concluded that *Lawlor* was irrelevant for reasons expressed as follows:

> "... Attached to one of the affidavits of National Screen are a total of 140 findings of fact and 12 conclusions of law by Judge C. William Kraft, Jr.... National Screen insists that such findings and conclusions ... are completely controlling in the instant case. Such findings and conclusions are noteworthy. The court found that the plaintiffs in that case failed to submit evidence that National Screen ... failed to fulfill plaintiff's requirements and requests for such accessories ... and that the plaintiffs suffered no damage or injury to their business or property as a result of any action on the part of National Screen. The District Court concluded as a matter of law that National Screen did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act; that the plaintiffs were not persons injured in their business or property within the meaning of Section 4 of the Clayton Act, 15 U.S.C.A., Section 15, by reason of any action or conduct of any of the defendants; that the plaintiffs failed to show any damage sustained by them as a result of any action on conduct of any of the defendants ..." 305 F. at pages 562-563).
>
> "The facts and the period of time involved in the Lawlor case are substantially different from those under consideration in the instant case." (305 F. 2d at page 654)

Accordingly, the Court of Appeals returned the case to the District Court for trial on the merits.

It was at this point that petitioner filed its amended complaint for the purpose of adding the charge of conspiracy, and now, as has been seen, the whole case stands dismissed because, as the district judge said (R.93, Appendix A, *infra* 24):

> "... the *Lawlor findings* as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nation wide in scope."

And the Court of Appeals has given its affirmation with only a pro forma, per curiam opinion.

It is believed that if any other group of monopolists has ever heretofore been able so to encroach on the vitals of the antitrust laws there is no record of it.[11]

CONCLUSION

For the foregoing reasons the prayer of this petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

FRANCIS T. ANDERSON
Attorney for Petitioner

---

[11] Among other decisions exemplifying the need for guarding the antitrust laws against the machinations of the respondents in this case are *Lawlor v. National Screen Service*, 352 U.S. 992 (1957) and *United States v. Paramount Pictures*, 334 U.S. 131, 163-164 (1948). In the latter case, this Court, referring to respondents in connection with another, but comparable, conspiracy, observed that (334 U.S. at 163-64):

> ". . . delegation of the management of . . . [a] system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals could be done only with the greatest reluctance."

Appendix A

OPINION OF THE DISTRICT COURT

(Filed: July 2, 1963)

On June 7, 1963, the motion picture distributor defendants, Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, and Warner Bros. Pictures Distributing Corporation, joining together for the purpose of a motion, filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asking that this Court dismiss the action instituted by the plaintiff under Sections 1 and 2 of the Sherman Act (15 U.S.C., Secs. 1 and 2) on the ground that there is no genuine issue as to any material fact, and that these defendants are entitled to a judgment in their favor as a matter of law.

The movants in this case hold copyrights in respect to motion pictures produced and distributed by them and have licensed National Screen to produce and distribute advertising accessories pertaining to those pictures. In the amended complaint filed by the plaintiff some two years after the filing of the original complaint, it is alleged that the movants have conspired with National Screen to monopolize the business of distributing standard motion picture accessories in the United States.

Substantially the same charge as is here made was made in the case of *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U. S. 922, in which the instant defendants, United Artists Corporation and Paramount Film Distributing Corporation, were also defendants. It seems to this Court that this *Lawlor* case is particularly significant in that the Third Circuit reviewed the historical origin of the motion picture distributor's relationship with National Screen and found absolutely no evi-

dence of conspiracy. That opinion states that, commencing around 1939, the motion picture distributors severally determined that it was uneconomic to produce and distribute their own accessories. For that reason, each entered into a separate agreement with National Screen for that purpose. In so doing, each acted individually and without reference to the others. The Court stated, in respect to the relationship between the motion picture producers and National Screen:

> ". . . They [the distributors] contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition."

Also strongly significant, in that it constitutes persuasive authority in this case, is the decision rendered by Judge Luongo in *Vogelestein v. National Screen Service Corporation*, 204 F. Supp. 591, in which the Court granted a summary judgment to the defendants sued therein in an action substantially similar to the case at bar. Because of a stipulation between the parties that any decision in *Lawlor* as to the existence of a conspiracy or monopoly would be dispositive of the conspiracy and monopoly questions in the other cases, the earlier claim by Vogelstein had been dismissed. Vogelstein, however, filed a further complaint in respect to the period of time subsequent to June 31, 1957, alleging a conspiracy between National Screen and the motion picture distributors, and, by amendment, alleged as a fact indicative of the conspiracy the refusal by National Screen on May 16, 1961, with the knowledge of the motion picture distributors, to deal further with him. The defendant's motion for summary judgment was granted, with Judge Luongo in *Vogelstein v. National Screen Service Corpora*ments concerning the *Lawlor* case:

"It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer."

Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope.

Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation.

Consequently, it is the belief of this Court that the motion for summary judgment filed by the motion picture distributor defendants should be granted as there appears to be no genuine issue of fact involved herein.

As the motion for summary judgment has been granted, it will be unnecessary for the Court to pass on the requests for admissions and interrogatories heretofore propounded by the plaintiff.

IT IS SO ORDERED.
This the 2nd day of July, 1963.

/s/ LEWIS R. MORGAN
United States District Judge

Appendix B

OPINION OF THE DISTRICT COURT AND ORDER DENYING MOTION FOR RECONSIDERATION

(Filed: August 30, 1963)

On August 9, 1963, the plaintiff in the above-styled case filed a motion for reconsideration and vacation of the decision rendered by this Court on July 2, 1963, contending that, since both this Court and the Court of Appeals have definitively had [sic] that National Screen is not entitled to summary judgment, it necessarily follows that the film companies are not entitled to summary judgment. The plaintiff points out that no court in Philadelphia or elsewhere has ever ruled that the film companies are any less liable than National Screen. They go on to say that from the very nature of a conspiracy case, it is legally and logically impossible for a Court to enter summary judgment in favor of an alleged co-conspirator sufficiently impilcated by the terms of the complaint.

It seems to the Court that the plaintiff's contention that, since National Screen was not granted summary judgment, then the distributor defendatns were not entitled to receive such relief ignores the fact that National Screen is charged with a refusal to deal with the plaintiff, an issue, it seems, wholly unrelated to the plaintiff's charge that the distributor defendants conspired to effect a monopoly to the plaintiff's prejudice and injury. In any case, it is not the pleading but the evidence submitted by way of oral testimony, or in affidavit form, which determines whether or not an issue of fact has been presented. When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to avoid burdening the courts with worthless

litigation. *Creel v. Lone Star Defense Corporation*, 171 F. 2d 964; *Chambers v. Equitable Life Assurance Society*, 224 F. 2d 338.

The Court sees no reason for disturbing its order of July 2, 1963, and hereby denies the plaintiff's motion for reconsideration.

IT IS SO ORDERED.
This the 29th day of August, 1963.

/s/ LEWIS R. MORGAN
United States District Judge

Appendix C

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

(January 22, 1965)

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: This is an appeal from a summary judgment which was entered against plaintiff-appellant in a private antitrust action seeking treble damages for an alleged violation of the Sherman Act. We have carefully reviewed the record and conclude that the trial court committed no error.[1]

The judgment is AFFIRMED.

[1] See Fed. R. Civ. P. 56(e); Dressler v. MV Sandpiper, 331 F. 2d 130 (2 Cir. 1964).

Appendix D

JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia; and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Poster Exchange, Inc., be condemened to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 22, 1965

Issued as Mandate: Feb. 16, 1965.

Appendix E

OPINION OF THE DISTRICT COURT IN RE NATIONAL SCREEN SERVICE CORP.

THE POSTER EXCHANGE, INC., *Plaintiff*

vs.

NATIONAL SCREEN SERVICE CORPORATION, *Defendant*

Civil Action No. 7665

On January 22, 1965, the United States Court of Appeals for the Fifth Circuit entered an Order affirming this Court's judgment of December 10, 1963, wherein judgment was entered in favor of Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Incorporated, Twentieth Century Fox Film Corporation, United Artists Corporation and Warner Brothers Picture Distributing Corporation. This judgment resulted from the granting on July 2, 1963, of a motion for summary judgment filed on behalf of these motion picture distributor defendants.

On January 31, 1964, the defendant in this case filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that as a result of the entry of the aforementioned judgment no genuine issue as to any material fact remained, and that therefore the defendant was entitled to judgment as a matter of law. This Court, on February 20, 1964, denied this motion for summary judgment, stating in the opinion that it would be improper to express an opinion as to the legal soundness of the plaintiff's case at a time when an order disposing of one of the principal areas of the plaintiff's suit is on appeal. This situation has now been corrected by the Fifth Circuit's affirming this Court's Order of December 10, 1963. Therefore, the motion for summary judgment will now be considered.

The plaintiff's attorney has repeatedly admitted that he had no case against the defendant herein unless this Court restored the long adjudicated issue of conspiracy, which this Court rejected in its Order granting summary judgment for the defendant on this issue. Thus, it seems to this Court at the present time that there is no triable issue of fact and that only a question of law is presented for determination.

This issue of law has been resolved by other courts in favor of the defendant. *Vogelstein vs. National Screen Service Corporation*, 204 F. Supp. 591, Aff'd. 310 F. 2d 738; *Lawlor vs. National Screen Service Corporation*, 270 F. 2d 146, Cert. Den. 362 U. S. 922.

This Court is in agreement with the findings of the above-cited cases and hereby grants the defendant's motion for summary judgment.

IT IS SO ORDERED.
This the 24th day of February, 1965.

/s/ LEWIS R. MORGAN
United States District Judge

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner,

versus

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

CITATIONS TO OPINIONS BELOW 1

THE QUESTIONS PRESENTED 1

COUNTER-STATEMENT OF THE CASE 2

ARGUMENT

I. PETITIONER SPECIFIED NO FACTS INDICATIVE OF A CONSPIRACY AMONG THE DISTRIBUTOR DEFENDANTS AND NATIONAL SCREEN, AND HENCE DID NOT MEET THE BURDEN IMPOSED ON IT UNDER RULE 56(e) WHEN CONFRONTED WITH THE MOTION FOR SUMMARY JUDGMENT 12

II. THE DISTRICT COURT WAS AUTHORIZED TO GIVE GREAT WEIGHT TO THE PREVIOUS CASES IN WHICH THE SAME CHARGE WAS MADE 15

III. PETITIONER WAS PRECLUDED FROM RECOVERY BECAUSE IT NEVER SOUGHT A LICENSE FROM ANY OF THE DISTRIBUTOR DEFENDANTS 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Brown v. Western Massachusetts Theatres, 288 F. 2d 302 (1st Cir. 1961) 20

Chambers and Company v. Equitable Life Assurance Society, 224 F. 2d 338 (5th Cir. 1955) 13

Columbia Pictures Corporation v. Charles Rubinstein, Inc., 289 F. 2d 418 (8th Cir. 1961) 20

Dressler v. Sandpiper, 331 F. 2d 130 (2nd Cir. 1964) 14

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, (C.A. No. 11,145, E.D. La. 1961) 6, 16

Interstate Circuit v. United States, 306 U. S. 208 (1938) 18

Lawlor v. National Screen Service Corporation, 270 F. 2d 146 (3rd Cir. 1959) cert. den. 362 U. S. 922 (1960) 2, 8, 10, 15, 16, 21

Lipp v. National Screen Service Corporation, 188 F. Supp. 245, aff'd 290 F. 2d 321 (3rd Cir. 1961), cert. den. 362 U.S. 922 (1960) 2

Milwaukee Towne Corporation v. Loew's, Inc., 190 F. 2d 561 (7th Cir. 1951) cert. den. 342 U. S. 909 (1952) 20

National Screen Service Corporation v. Poster Exchange, Inc., 305 F. 2d 647 (5th Cir. 1962) 3

Norton v. McShane, 332 F. 2d 855 (5th Cir. 1964) 14

AUTHORITIES — (Continued)

Page

Paramount Film Distributing Corp. v. Appelbaum, 217 F. 2d 101 (5th Cir. 1954) 20

Poster Exchange, Inc. v. National Screen Service Corporation, 198 F. Supp. 557 (D. C. Ga. 1961) 3

Royster Drive-In Theatres v. American Broadcasting-Paramount, 268 F. 2d 246 (2nd Cir. 1959) 20

Simmons v. Union News Company, 341 F. 2d 531 (6th Cir. 1965) 18

United States v. National Screen Service Corporation, CCH Trade Cases § 68,670 (D.C. N.Y. C.A. No. 75,138) 20

Vogelstein v. National Screen Service Corporation, 204 F. Supp. 591 (D. C. Pa. 1962) aff'd. 310 F. 2d 738 (3rd Cir. 1962) cert. den. 374 U. S. 840 (1963) 2, 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner,

versus

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Petitioner refers to the opinion of the District Court, dated July 2, 1963 (R. 90) as unreported and reproduces a copy as Appendix A to its petition. This opinion is reported in 35 F.R.D. 558.

THE QUESTIONS PRESENTED

The question involved is not, as petitioner prefers to assert, i.e., whether petitioner is bound by a judgment entered in another court in a suit by a different plaintiff, but whether, as found by the District Court and affirmed by the Circuit Court, there has been

no showing by petitioner on respondents' Motion for Summary Judgment that there is a genuine issue of fact for determination involving respondents.

At no point in this case have respondents contended that the doctrine of *res judicata* applies. The District Court, as it was entitled to do, held that other cases predicated on the same evidence as petitioner stated it planned to offer in this case, were entitled to great weight.

This Court on three separate occasions had denied applications for certiorari in such cases. *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), cert. den. 362 U.S. 922 (1960); *Vogelstein v. National Screen Service Corporation*, 204 F. Supp. 591 (D.C. Pa. 1962), aff'd 310 F. 2d 738 (3rd Cir. 1962), cert. den. 374 U.S. 840; *Lipp v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), cert. den. 362 U.S. 922 (1960).

COUNTER-STATEMENT OF THE CASE

The statement made by petitioner is deficient and incorrect in several important respects. The decision of the District Court cannot be understood except in the light of what the District Court had before it when it granted the Motion for Summary Judgment.

The original complaint was filed on July 17, 1961, in which petitioner (plaintiff) named only National Screen Service Corporation (National Screen) as a defendant, charging it with the maintenance of an illegal monopoly in respect of the production and distribution of standard motion picture advertising accessories, and

its refusal subsequent to May 16, 1961 to deal with plaintiff (R. 1).

The District Court granted a temporary restraining order and denied a summary judgment in favor of National Screen. (*Poster Exchange, Inc. v. National Screen Service Corporation,* 198 F. Supp. 557, D.C.N.D. Ga. 1961). On appeal, the Circuit Court affirmed (*National Screen Service Corporation v. Poster Exchange, Inc.,* 305 F. 2d 647, 5th Cir., July 11, 1962).

On the eve of trial, counsel for plaintiff withdrew and were immediately succeeded by Francis T. Anderson, Esquire, of Philadelphia, who has represented plaintiff poster-renters in anti-trust suits against National Screen and motion picture distributors, over a period of years, all of which have been determined in favor of National Screen and the motion picture distributors and in which the same questions here involved were determined adversely to the contentions made by Mr. Anderson on behalf of this plaintiff (see pages 15-19 of this brief).

On March 12, 1963, plaintiff filed an amended complaint (R. 35) naming as additional defendants Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation and Warner Bros. Pictures Distributing Corporation, all motion picture distributors, the respondents herein but referred to as the motion picture distributors or distributor defendants. These distributor defendants were charged with conspiracy with National Screen to create an illegal monopoly through the use of exclusive contracts giving National Screen the sole right to distribute advertising

accessories as to pictures distributed by the distributor defendants (Par. 8, R. 38-39).

The District Court dissolved the preliminary restraining order previously granted (R. 33) when it permitted the amended complaint to be filed.

Thus it was only after the passage of almost two years that plaintiff sought to involve in the controversy between itself and National Screen the distributor defendants, none of which is engaged in the manufacture or distribution of advertising accessories, and at the cost of the restraining order granted to plaintiff.

The distributor defendants in their answers denied the allegation as to conspiracy. The substance of the defense of each distributor defendant is contained in the "Third Defense" of Metro-Goldwyn-Mayer, Inc. (R. 70) as follows:

> "This defendant is engaged in the distribution of motion pictures. Exhibitors who license such pictures use from time to time what is known in the trade as motion picture accessories to advertise said pictures. For many years, this defendant manufactured and distributed such motion picture accessories. Sometime prior to 1947 it licensed the defendant National Screen Service Corporation exclusively to manufacture and distribute accessories to exhibitors desiring them. In 1952 the said license was made non-exclusive. This defendant's only concern is that proper motion picture accessories may be made available

> to exhibitors who license pictures distributed by it. This defendant has not participated with any of the other defendants for the purpose of creating a monopoly in the defendant National Screen Service Corporation. National Screen Service Corporation is the only party which has sought a license from this defendant to manufacture and distribute advertising accessories."

Based on plaintiff's answers to interrogatories and admissions of officers of plaintiff and cases in which similar questions had been decided adversely to the contentions of plaintiff, the distributor defendants moved for summary judgment (R. 81) on the ground:

> "The above shows that plaintiff has no facts to support its charge that movants, the motion picture producers and distributors named as defendants in this case, conspired with the defendant National Screen Service Corporation, or with each other, for the purpose of creating in National Screen Service Corporation a monopoly in the distribution of motion picture advertising accessories, in violation of the Sherman Act."

Interrogatories

The distributor defendants sought by discovery interrogatories (R. 71) to obtain the facts on which plaintiff based its claim that they, or any of them, were parties to a conspiracy with National Screen to monopolize the business of distributing standard advertising

accessories on a national scale, and also names of persons having knowledge of such facts.

Plaintiff answered (R. 78) that relations prior to 1957 continued after 1957, that even though plaintiff knew that licenses became non-exclusive, plaintiff decided against applying for a license (R. 86).

Thus plaintiff failed to submit a single fact to support its conspiracy claim. It merely stated its contention that even though the licenses had been changed from exclusive to non-exclusive, this had no effect.

Admissions of W. H. Cobb

A similar suit had been brought in New Orleans in 1961 by *Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation* and the distributor defendants (E.D. La. No. 11,145, 1961) and in the deposition of W. H. Cobb, stockholder and officer of this plaintiff, taken on May 31, 1961 and also at a hearing on a motion for interlocutory judgment (R. 83-84), when asked if he knew of any facts indicating a conspiracy between the producer (distributor) defendants and National Screen, he replied that he did not.

Deposition of M. J. Rogers

Mr. Rogers testified by deposition in this case August 11, 1961 before the filing of the amended complaint that he was president and manager of plaintiff but the stockholders were W. H. Cobb of New Orleans, L. C. Montgomery of New Orleans and the John T. Ezell, Sr. Estate; that W. H. Cobb has been secretary and treasurer since the corporation was formed; that he Rog-

ers, fixed the policies to be followed with the concurrence of the stockholders; that at no times was any license sought of any motion picture producer to manufacture and distribute standard accessories although it was discussed with the stockholders (R. 86); that W. H. Cobb was interested not only in the New Orleans and Atlanta poster exchanges but one in Memphis as well (R. 84-85).

Admissions of Plaintiff's Attorney in Open Court

In addition to the above, the District Court had the admission of plaintiff's attorney in open court on which to base its grant of the motion. This is referred to in the District Court's opinion (R. 93, Appendix A to petition for certiorari, p. 24).

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation."

Plaintiff made no showing by affidavit or otherwise of any factual issue existing on its charge of conspiracy.

The District Court found that as plaintiff had no evidence of conspiracy in respect of the distributor defendants other than that previously determined to be insufficient as a matter of law, the motion should be granted. The previous determination had been in the *Lawlor* case supra, 270 F. 2d 146, 148 (3rd Cir. 1959), where the Court of Appeals noted, in affirming, that "In effect the trial court held that plaintiffs had failed to sustain their burden of proof." On the conspiracy issue, the Court of Appeals specifically noted, 270 F. 2d 146, 154, ". . . the plaintiffs here failed in their proof of an 'arrangement,' 'plan,' or 'scheme'." As a matter of law, then, the same evidence here could have only that insufficient effect as proof of conspiracy.

The District Court in denying plaintiff's motion for reconsideration (R. 96, Appendix B to petition for certiorari, p. 26), further stated the court's reasons for granting it (R. 97, Appendix B, pp. 26-27), emphasizing that no showing had been made by plaintiff that there was any issue of fact for determination, and concluding:

> "When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to avoid burdening the courts with worthless litigation."

Factual Background

Plaintiff has been engaged in the business of renting to motion picture exhibitors advertising material such as posters, purchased from National Screen and distributors of motion pictures who handle directly advertising material such, for example, as Columbia

Pictures Corporation and Universal Film Exchange, Inc. The situation is outlined in the opinion of the Circuit Court in the first appeal (305 F. 2d 647) at pages 649-650:

> "Poster Exchange is a poster-renter or 'jobber' engaged in the business of selling or renting to motion picture theatres standard motion picture advertising accessories, such as posters and stills for theatre billboards and lobbies. National has for many years been engaged in the business of manufacturing and distributing such motion picture advertising accessories directly to motion picture theatres as well as to poster-renter jobbers such as Poster Exchange. This resulted in National competing with its 'jobbers' for the motion picture theatre's advertising business. Poster Exchange has obtained accessories from National since the year 1947 in substantial quantities. The market area involved embraces cities in the state of Alabama, Georgia, Florida and Tennessee. National also supplies exhibitors in the same area and both are engaged in interstate commerce. There is no contractual relationship between the parties.
>
> "National notified Poster Exchange on February 15, 1961, that from and after May 16, 1961, National would no longer make accessories available to poster-renter 'jobbers' such as Poster Exchange, but would restrict its business to dealing solely and directly with motion picture theatres, often referred to as exhibitors.

"Prior to 1952, National Screen had an exclusive license from the motion picture companies to manufacture and distribute motion picture advertising accessories. There is some dispute as to whether the license was exclusive between 1952 and 1957 or non-exclusive, but in 1957 National Screen entered into a 'Consent Decree' with the government in a case then pending in the United States District Court, Southern District of New York, styled United States of America v. National Screen Service Corp., et al.

"The crux of this 'Consent Decree' was to give Poster Exchange (and others) the qualified right to obtain its own license to manufacture and distribute its own accessories and to compete with National in the market.

"Poster Exchange is not presently, nor has it ever been, in the business of manufacturing motion picture accessories.

The background of these poster-renter cases was reviewed in great detail in the *Lawlor* case (270 F. 2d 146) and the District Court's reference thereto is adequate (R. 91, Appendix A, p. 23).

"That opinion states that, commencing around 1939, the motion picture distributors severally determined that it was uneconomic to produce and distribute their own accessories. For that reason, each entered into a separate agreement with National Screen for that purpose. In so doing, each acted individually and

without reference to the others. The Court stated, in respect to the relationship between the motion picture producers and National Screen:

> " '. . . They [the distributors] contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition.' "

There is no dispute as to the fact that these distributor defendants entered into contracts with National Screen for the latter to manufacture and distribute advertising accessories concerning motion pictures distributed by the distributor defendants, and that at first such contracts were exclusive but later non-exclusive, this at different times but some years ago. There is also no dispute that plaintiff has never sought a license to manufacture and distribute such accessories from any of the distributor defendants, as authorized by the consent decree. On these facts and others in the record the Circuit Court had no choice but to affirm the decision of the District Court.

In petitioner's statement it is said that the respondents are five major motion picture distributors who produce the accessories that petitioner National Screen distributes. This is incorrect. Production of such accessories is by National Screen. Furthermore, no reference is made by petitioner to the grounds of the Motion for Summary Judgment, plaintiff's answer to the inter-

rogatories, the admissions of plaintiff's officers, a companion case in New Orleans or the admission of plaintiff's attorney in open court. No reference is made to the requirements of Rule 56 (e) of the Federal Rules of Civil Procedure and particularly the amendment adopted by this Court on January 1, 1963 that on motion for summary judgment an adverse party may not rest upon the mere allegations or denials of his pleadings but must set forth by affidavits or otherwise specific facts showing that there is a genuine issue for trial.

ARGUMENT

I.

PETITIONER SPECIFIED NO FACTS INDICATIVE OF A CONSPIRACY AMONG THE DISTRIBUTOR DEFENDANTS AND NATIONAL SCREEN AND HENCE DID NOT MEET THE BURDEN IMPOSED ON IT UNDER RULE 56(e)

Respondents, brought into the case some twenty months after it was filed, sought to ascertain from the plaintiff the facts on which plaintiff in its amended complaint based its claim of conspiracy. In answer to interrogatories seeking such facts, plaintiff was able to suggest none at all.

There was the admission of an officer and stockholder of the plaintiff in the companion case brought in New Orleans that he knew of no facts to support a similar charge of conspiracy. Plaintiff's manager, on deposition in this case, admitted that plaintiff had made no application to any distributor defendant for a license to make and distribute advertising accessories.

There were the decisions in other courts involving the same issue of conspiracy in which the present counsel for petitioner had participated wherein the issue had been decided contrary to plaintiff's contention.

Accordingly, the distributor defendants moved for summary judgment on the ground that no factual issue as to conspiracy was presented. To this motion plaintiff made no showing by affidavit or otherwise that any such factual issue existed so as to justify a long and tedious trial on the merits, but relied on the allegations of the amended complaint.

Plaintiff's duty under the circumstances is spelled out in the amendment to Rule 56(e) adopted by this Court on January 21, 1963 to prevent a party against whom such a motion is filed from relying on his pleadings, the amendment reading as follows:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Even before this amendment was enacted, the same rule was applied in all of the circuits with the possible exception of the Third Circuit. The Fifth Circuit in *Chambers and Company v. Equitable Life Assurance Society*, 224 F. 2d 338, 346 (5th Cir. 1955) held:

> "It was not permissible that Appellant hold back any evidence or fail to make a full disclosure of the facts upon which it relied for recovery. Disclosure under summary judgment must be full and complete."

The Second Circuit in *Dressler v. M. V. Sandpiper*, 331 F. 2d 130 (2nd Cir. 1964), discussed the above amendment as having been adopted to meet the decisions of the Third Circuit, saying the Rule was specifically amended to provide that:

> "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings but his response, by affidavits or as otherwise provided by this Rule, must set forth specific facts showing that there is a genuine issue for trial."

In *Norton v. McShane*, 332 F. 2d 855, 861 (5th Cir. 1964) the court had this to say with reference to another situation in which the plaintiffs were relying exclusively on allegations in their complaint:

> "In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as provided in Rule 56, supra, to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. See Cunningham v. Securities In-

vestment Company, 5 Cir. 1960, 278 F. 2d 600, 602, 603. The plaintiffs introduced no evidence whatever, and thus failed completely to meet the burden resting upon them."

At the hearing on the Motion for Summary Judgment plaintiff's attorney, in response to a question from the District Court, admitted he was relying on the same evidence in this case to establish conspiracy as he had relied on unsuccessfully in the *Lawlor* case (R. 93, Appendix A to petition for certiorari, p. 24).

Petitioner not only failed to offer any facts to justify a trial on the issue of conspiracy but evaded any attempt to argue it had complied with Rule 56 (e) when the review of the District Court's decision was had in the Circuit Court and it has also ignored this question in its petition for certiorari.

II.

THE DISTRICT COURT WAS AUTHORIZED TO GIVE GREAT WEIGHT TO THE PREVIOUS CASES IN WHICH THE SAME CHARGE WAS MADE

In reaching its decision the District Court had the benefit of the following cases in which the charge had been made that the distributor defendants conspired with National Screen:

Lawlor v. National Screen Service Corp., 270 F. 2d 146 (3rd Cir. 1959, cert. den. 362 U. S. 922, 1960)

Vogelstein v. National Screen Service Corp., 204 F. Supp. 591 (D.C.E.D. Pa. 1962), aff'd 310 F. 2d 738 (3rd Cir. 1962), cert. den. 374 U.S. 840

Exhibitors Poster Exchange, Inc. v. National Screen Service Corp. (C.A. No. 11, 145 U.S.D.C. E.D. La).

In the *Lawlor* case the issue of conspiracy, as well as that of monopoly, were both tried at length before the District Court without a jury. The District Court entered findings of fact and conclusions of law which are contained in the Supplemental Record. The District Court found in conclusions of law Nos. 3 and 4 (Supp. R. 67):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 3 of the Sherman Act.
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Petitioner would have this Court believe that notwithstanding these conclusions, there was no determination in the *Lawlor* case that conspiracy had not been shown. When, however, the District Court judgment was affirmed on appeal by the Third Circuit, the Court of Appeals reviewed the background and concluded that there was no showing of anything illegal in the separate decisions by the distributor defendants to enter into contracts with National Screen for the latter to manufacture and distribute advertising acces-

sories on the pictures which they distributed. (270 F. 2d 146, 155) It was duly noted that plaintiff had never sought from any of the distributor defendants licenses under which they themselves would manufacture accessories and in fact it was expressly stated that they did not desire such licenses (270 F. 2d 146, 154).

This Court refused to grant a writ of certiorari.

In the *Vogelstein* case, the motion for summary judgment of the defendants was granted. It will be obvious from the following part of the District Court's opinion in that case that the same contention was there made as is here made by counsel for petitioner:

> "It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of these issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer." (204 F. Supp. 591, 596).

In the New Orleans case, brought at about the same time as this one, a motion for summary judgment on behalf of the distributor defendants was made and granted. Judge Herbert W. Christenberry's Orders dated July 26, 1961 are unreported but the court stated it found no genuine issue of fact had been submitted to the trial court and that the motion picture distributors were entitled to judgment as a matter of law.

Of interest is the decision of *Simmons v. Union News Company,* 341 F. 2d 531, 533 (6th Cir. 1965), where the court held the doctrine of *stare decisis* to be applicable where the plaintiff was not a party to a prior case, the court stating at page 533:

> "We agree with appellant that the judgment in the Hildreth case is not res judicata of the claim in the present case. The present plaintiff was not a party to that litigation. United States v. Pink, 315 U.S. 203, 216; Lawlor v. National Screen Service Corp., 349 U.S. 322, 329, dismissed under Rule 60, 359 U.S. 951. But the doctrine of stare decisis is applicable. Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231, 236, C.A 6th, cert. denied, 366 U.S. 911."

Petitioner urges that the findings in *Lawlor* are ineffectual insofar as absolving the licensors on the charge of conspiracy and cites *Interstate Circuit v. United States,* 306 U. S. 208. There is little, if any, resemblance between the facts found in the two cases. The *Interstate* decision by this Court was predicated on the conclusion that each defendant knowingly accepted an invitation to join in the plan proposed, that unanimous action was required for success, that it offered

an opportunity for increased profits and that failure to participate offered the risk of substantial losses (302 U. S. 222, 223, 225, 226). The finding in *Lawlor* quoted by petitioner on page 12 of its brief completely refutes any knowledge or consultation with others by the defendant Paramount:

> "The decision did not depend upon the action of any other company with respect to a similar contract or arrangement. The decision was based upon the business interests of Paramount Pictures, Inc."

Petitioner notes that substantially the same finding was made with respect to the other seven licensors.

The District Court was entitled to give great weight to the prior cases in which efforts to prove a conspiracy with National Screen had been unsuccessful, in the light of the admission of plaintiff's counsel that he was relying on the same evidence as was offered in *Lawlor* and plaintiff's failure to offer any facts to justify another trial on the same issue.

III.

PLAINTIFF WAS PRECLUDED FROM RECOVERY BECAUSE IT NEVER SOUGHT A LICENSE FROM ANY OF THE DISTRIBUTOR DEFENDANTS

Though plaintiff complains of the license agreements made individually by the distributor defendants with National Screen to manufacture and distribute accessories and the refusal of National Screen to supply plaintiff, plaintiff has never sought such a license from

any of the distributor defendants. This was admitted by M. J. Rogers, plaintiff's president and managing officer in Atlanta, on his deposition (R. 86-88).

Before a private anti-trust plaintiff may recover, it must have demanded that which it claims to have lost because of the alleged illegal acts. *(Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951), cert. den. 342 U. S. 909, 1952; *Royster Drive-In Theatres v. American Broadcasting-Paramount*, 268 F. 2d 246, 251 (2nd Cir. 1959), cert. den. 361 U. S. 835; *Paramount Film Distributing Corp. v. Appelbaum*, 217 F. 2d 101, 127 (5th Cir. 1954); *Brown v. Western Massachusetts Theatres*, 288 F. 2d 302, 305 (1st Cir. 1961); *Columbia Pictures Corp. v. Charles Rubinstein, Inc.*, 289 F. 2d 418, 421 (8th Cir. 1961). In *Lawlor*, supra, the Third Circuit said as to plaintiff's failure there to seek licenses from the motion picture distributors (270 F. 2d 146, 155):

> "Plaintiffs have never attempted to obtain from any of the film companies licenses under which they themselves would manufacture accessories and, in fact, have expressly stated that they do not desire such licenses. In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an anti-trust action."

Petitioner also takes exception to the terms of the consent decree entered in *United States v. National Screen Service Corporation, et al*, D.C.S.D. N.Y. C.A. No 75,138, CCH Trade Cases §68,670, which set up certain ground rules to be followed by the motion picture

distributors in connection with the granting of licenses to manufacture and distribute accessories.[1] But plaintiff's manager admitted it never even sought such a license.

Faced with the situation that plaintiff offered no evidence to indicate a conspiracy between the distributor

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[1]The pertinent provisions of the decree are Sections V(A) and V(B) (1):

> "(A) Subject to the other provisions in this Section V, each Producer Defendant is ordered and directed to grant to any qualified person applying therefor a license (including a license under the Producer Defendant's copyrights) to produce and distribute any type of trailers or to produce and distribute accessories relating to motion pictures released by the Producer Defendant, so long as and to the extent that the Producer Defendant or its distributor (as provided for below) licenses or otherwise authorizes any other person [other than an affiliate as described in Section II(C) hereof] to produce and distribute the trailers or the accessories sought to be produced and distributed by the person applying for the license; Provided, however, that any such license so granted may require reasonable terms and conditions (including payment of a reasonable royalty) agreed to by the Producer Defendant. In the event a Producer Defendant turns over distribution of its motion pictures to a non-affiliated distributor not a defendant herein, such Producer Defendant must either itself license pursuant to this Subsection (A) or require such distributor so to do.
> (B) No Producer Defendant shall be required to regard any person as a qualified applicant within the meaning of Subsection (A) unless:
>
> (1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities *and a national distribution organization* and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standards of determining the adequacy of the applicant's qualifications." [Emphasis supplied]

defendants and National Screen, and the decisions in other jurisdictions involving the same license agreements relied upon by the plaintiff, the District Court had no choice but to hold that the motion for summary judgment should be granted and the distributor defendants not be put to long and expensive litigation on a retrial of questions already determined. As the District Court had given careful consideration to the question and entered opinions both on the motion and on rehearing, the *per curiam* opinion of affirmance by the Circuit Court was proper.

Thus plaintiff is clearly precluded from a recovery in the instant case because of its failure to seek a license from any of the distributor defendants.

CONCLUSION

Petitioner has shown no justification for the granting of the requested writ of certiorari. There is no conflict between decisions of any courts to be resolved. The decision in question is a proper application of Rule 56(e). What petitioner is complaining of is its own failure to meet the requirements of said Rule and to justify the holding of a long and tedious trial on the question of conspiracy. On the showing made, the motion for summary judgment was properly granted. As the District Court said (R. 98, Appendix B petition for certiorari, pp. 26-27):

> "When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to

avoid burdening the courts with worthless litigation."

Respectfully submitted,

_____

Robert S. Sams

_____

Tench C. Coxe
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CERTIFICATE OF SERVICE

I, ROBERT S. SAMS, of counsel for respondents, do hereby certify that I have served a copy of the foregoing Response to the Petition for Certiorari on petitioner's counsel by depositing same in the United States mail, with Air Mail postage prepaid addressed to petitioner's counsel of record at his post office address.

This ____ day of May, 1965.

_____

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 14 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL SCREEN SERVICE CORPORATION IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement	2
Argument	9
I. The summary judgment was based on petitioner's failure to show any genuine factual issue as to the allegation of conspiracy	9
II. Petitioner's irrelevant contention that the *Lawlor* judgment rested solely on failure to prove injury is patently false	13
Conclusion	16

Table of Cases Cited

Dressler v. MV Sandpiper (2d Cir.), 331 F. 2d 130	10
Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation (E. D. La.), Civ. 11,145	5
Lawlor v. National Screen Service Corp., et al., 349 U. S. 322	15
Lawlor v. National Screen Service Corporation, et al. (3d Cir.), 270 F. 2d 146, cert. den. 362 U. S. 922	3, 5, 6, 13, 14
Lipp v. National Screen Service Corp., et al. (E. D. Pa.), 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835	4, 8
The Poster Exchange, Inc. v. National Screen Service Corp. (5th Cir.), 305 F. 2d 647	15

PAGE

Bob Smith d/b/a Theatre Poster Service v. Paramount Film Distributing Corp., W. D. Okla. No. 9274 6

United States v. National Screen Service Corp., et al., S. D. N. Y., Civ. 75-138, 1957 Trade Cases Par. 68,670 4

Vogelstein v. National Screen Service Corporation, et al. (E. D. Pa.), 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840 .....4, 7, 14, 15

Other Authority Cited

Rule 56(e), Federal Rules of Civil Procedure 10, 12

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL SCREEN SERVICE CORPORATION IN OPPOSITION

Question Presented

Did the District Court and the Court of Appeals correctly determine that the petitioner herein failed to submit specific material facts showing that a genuine issue for trial exists as to whether the defendants-respondents herein had conspired in violation of the antitrust laws with resultant prejudice and injury to petitioner?

Statement

Petitioner, plaintiff in this civil antitrust suit, seeks review by this Court of the Court of Appeals' unanimous affirmance of a summary judgment granted by the District Court to five defendants, all distributors of motion pictures. The remaining defendant, National Screen Service Corporation (hereinafter "National Screen"), respectfully submits this brief in opposition to the petition for certiorari.

Petitioner's original complaint

The original complaint (filed on July 17, 1961) named this respondent, National Screen, as the only defendant, and asserted a private treble-damage antitrust claim. Petitioner, a poster-renter or "jobber" engaged in the business of selling or renting to motion picture theatres standard motion-picture advertising accessories—such as posters and stills for theatre lobby and billboard display (Original Complaint, par. 2, R. 1)—sought an injunction and treble damages (R. 12) from National Screen, which has for many years been engaged in the business of manufacturing such motion picture advertising accessories under *non-exclusive* licenses from motion picture producers, and distributing them not only directly to motion picture theatres (thus competing with petitioner for the motion picture theatres' business), but also to "jobber" poster-renters such as the petitioner herein (Original Complaint, par. 3, R. 2).

The gravamen of petitioner's original complaint was that though National Screen had previously made its own-manufactured advertising accessories available to the plaintiff poster-renter, petitioner was notified by National Screen on February 15, 1961, that from and after May 16, 1961, National Screen would no longer supply advertising accessories to "jobbers" such as petitioner, but would restrict

its business to dealing directly with motion picture theatres (Original Complaint, pars. 15 and 16, R. 8).

In its original complaint, petitioner expressly conceded that it had succeeded "at the expense" of National Screen, in actively competing for the business of renting to motion picture theatres the advertising accessories which it acquired from National Screen for many years (Original Complaint, par. 12, R. 7). Petitioner asserted that unless National Screen was compelled to continue to make advertising accessories available to petitioner, the petitioner would, in all probability, be required to go out of business, and requested that the Court require National Screen to continue to make its own standard accessories available to the petitioner herein (Original Complaint, pars. 18-21, R. 9-11).

Petitioner's amended complaint—filed *almost two years later*—not only added five new parties, but for the first time, charged all defendants with conspiracy to monopolize.

On the very eve of trial, *i.e.*, on March 13, 1963, almost two years after the filing of this action—the case having been set down for trial during the early part of April, 1963—petitioner's prior counsel, Mr. C. Ellis Henican, Jr., moved for leave to withdraw from the case, although he continued to act as counsel for the plaintiff *Exhibitors Poster Exchange, Inc.*, a poster-renter owned by the same individual who is part-owner and a director of petitioner herein, in a poster-renter action against the same respondents in the United States District Court in New Orleans, La. Mr. Henican was replaced by Mr. Francis T. Anderson, who had represented poster-renters in all but one of the dozen or more treble damage suits brought by poster-renters against National Screen and motion picture producers—all of which actions have been decided in favor of the respondents herein. (*Lawlor* v. *National Screen Service Corporation et al.* (3d Cir.) 270 F. 2d 146, cert.

den. 362 U. S. 922; *Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840; *Lipp, Siegel, Schrader, Mitchel, Riff and Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835).

On the very first day after becoming petitioner's attorney herein, Mr. Anderson moved for leave to serve an amended complaint, bringing in for the first time the five motion picture distributor defendants, and asserting for the first time in this case, that those defendants conspired with National Screen, "to monopolize the business of distributing standard accessories on a national scale" (cf. petitioner's motion, R. 29-32, particularly par. 7, R. 31), through the device of exclusive licenses to National Screen (Amended complaint, pars. "8" and "8A", R. 38-9).

Significantly, however, petitioner's new counsel overlooked that prior counsel had conceded in its original complaint that "by the end of 1957 National Screen had ceased to have exclusive contract rights * * *" (Par. 11, R. 6). New counsel therefore felt compelled to repeat that fact which had been judicially established by the "Consent Decree" entered on March 29, 1957, in *United States* v. *National Screen Service Corp. et al.*, S. D. N. Y., Civ. 75-138, 1957 Trade Cases, Par. 68,670.

Petitioner's judicial admissions that there is no genuine issue of fact as to conspiracy.

At the time petitioner's new counsel, Mr. Anderson, moved for leave to serve the amended complaint in which he added the five respondent motion picture distributors, charging them with having conspired with National Screen to effect a monopoly in the distribution of motion picture standard advertising accessories, he was thoroughly aware of the fact that petitioner's director and owner of a one-third interest—Mr. W. H. Cobb—had already testified in

a companion action brought by his New Orleans poster-renter firm (R. 88) (*Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corporation,* E. D. La., Civil Action No. 11,145) that he did not know of any facts "indicating conspiracy between these producer-defendants and National Screen" (R. 83-4).

In fact, in that New Orleans case, in reliance upon that conclusive admission and the total absence of any other evidence, Judge Christenberry on July 26, 1961 granted the motions of all of the motion picture distributor-defendants for summary judgment-expressly reciting as the basis for his orders, that there existed no genuine issue of fact to be submitted to the trial court. The plaintiff in that action, *Exhibitors Poster Exchange, Inc.,* did not appeal from Judge Christenberry's orders. Significantly, the attorneys for that plaintiff, i.e. Exhibitors Poster Exchange, Inc., which is owned by Mr. Cobb, who is also a director and one-third owner of petitioner herein, were the same attorneys (Henican, James & Cleveland) who represented petitioner herein from the inception of the instant action in July 1961, until they withdrew almost two years later in March 1963, and were replaced by Mr. Anderson, who for the first time injected the charge of conspiracy.

On the basis of the admission by petitioner's director and part-owner, the same Mr. Cobb, that he knew of no facts indicating conspiracy between the distributor-respondents herein and National Screen, the distributor-respondents herein moved for summary judgment (R. 81-83).

On the argument herein, in the District Court, Mr. Anderson confessed that he had no evidence other than that which he had heretofore relied upon in *Lawlor* v. *National Screen Service Corporation et al.,* where after a protracted trial, the District Court had entered 140 Findings and Fact and 12 Conclusions of Law, completely absolving National Screen and the motion picture distributor defendants of the charges of monopolization and conspiracy

to monopolize—a determination affirmed by the unanimous Court of Appeals for the Third Circuit (270 F2d 146), and by this Court's denial of certiorari (362 U. S. 922).

Mr. Anderson's concession that he had no evidence of conspiracy to offer in the present case other than the evidence he had presented as attorney for plaintiffs in the *Lawlor* case was specifically noted in the District Court's opinion herein (R. 93):

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the *same evidence* in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation." (Emphasis added.)

Petitioner's attorney has repeatedly conceded that the issues as to liability are identical in all the poster-renter cases throughout the United States—in all of which except one—petitioner's attorney, Mr. Anderson, was attorney for the plaintiffs.

Mr. Anderson's admission before the District Court in this case that he has no evidence as to conspiracy other than that which was submitted in the *Lawlor* case has been repeatedly made in the many poster-renter cases in which he has represented the plaintiffs, which, as we have pointed out, included all of them, except the *Smith* case in Oklahoma City (*Bob Smith d/b/a Theatre Poster Service* v. *Paramount Film Distributing Corp., National Screen Service Corp., et al.*, W. D. Okla., No. 9274), which similarly ended

by the Court's granting summary judgment in favor of the defendants.

Indeed, in a pre-trial hearing held in the instant case on December 9, 1963, the Court asked Mr. Anderson how the present case differed from *Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840, another case wherein Mr. Anderson represented the plaintiff poster-renter, and received this response (S.M. pp. 26-7):

> "The Court: Let me ask you this. Now how did Vogelstein and Poster Exchange differ?"
>
> * * *
>
> "Mr. Anderson: * * * all the cases throughout the country, the *Smith* case out in Oklahoma, *Lawlor* in Philadelphia and *Vogelstein* in Washington, wherever you go, as I see it, *they are the same with respect to the proof of liability* * * *." (emphasis added).

Again—the same admission by Mr. Anderson to District Judge Luongo in *Vogelstein* v. *National Screen Service Corporation et al., supra.* Judge Luongo's opinion states:

> "At argument on the motion to dismiss the Court asked counsel for Vogelstein if he had any additional evidence over and above that presented at the Lawlor trial. His reply was, in effect, that the case *might* be tried differently, or that it *might* be tried by other counsel who *might* present the case in a different fashion. At no time did he indicate to the Court that he was in possession of additional evidence to present, only that the case might be differently tried (and tried to a jury rather than to the Court alone)." (204 F. Supp. at 597; emphasis the Court's.)

The official transcript of the argument before Judge Luongo on January 2, 1962, reflects the following question by the Court and Mr. Anderson's response (S.M. p. 28):

> "The Court: Well, have you come into possession of additional facts that were not available at the time of the *Lawlor* trial?

> Mr. Anderson: I don't know that I am in possession of additional facts.* * *" (S.M. p. 28)

Mr. Anderson's avowed position that all the poster-renter cases are *"the same with respect to the proof of liability"*, was his position even *before* the *Lawlor* case, *supra,* was tried, for when the *Lawlor* trial was about to commence in the District Court in Philadelphia, Mr. Anderson as plaintiff's attorney stipulated that the findings of fact by the Court after a trial in the *Lawlor* case, on the fundamental and dispositive issues of conspiracy to monopolize, would be determinative of these same issues in *six* companion cases brought by other poster-renters in other parts of the United States (*i.e., Lipp, Siegel, Schrader, Mitchell, Riff and Vogelstein* v. *National Screen Service Corporation, et al., supra,* p. 4) which were then pending in the District Court. Mr. Anderson later attempted to disavow that stipulation, which the Courts refused—(*Lipp* v. *National Screen Service Corp., et al.,* 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835), the Court of Appeals stating:

> "The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling *several cases involving the same points.* The judge could have ordered a consolidated trial for all of them. See Fed. R. Civ. P. 42(a), 28 U. S. C. It was considered more feasible to handle the litigation in the manner stipulated for." (290 F. 2d at 322; emphasis added.)

Thus, not only petitioner's attorney but the Court of Appeals judicially recognized the complete identity of factual and legal issues in all of the poster-renter cases—and in all, petitioner's attorney was attorney for the plaintiff.

The entry of summary judgment and the Court of Appeals' unanimous affirmance.

After finding that no factual evidence had been submitted in support of the newly-added charge of conspiracy, the District Court pointed to the further circumstance of Mr. Anderson's judicial admission that he had no evidence of a conspiracy between the motion picture distributors and National Screen other than that which he had previously relied upon in *Lawlor*, and correctly concluding that "there appears to be no genuine issue of fact involved herein" (R. 93), granted the motion of the distributor-respondents for summary judgment (R. 90-94).

The District Court further denied petitioner's motion for reconsideration (R. 97-98).

The Court of Appeals for the Fifth Circuit unanimously affirmed the summary judgment against petitioner, with the very significant comment:

> "We have carefully reviewed the record and conclude that the trial court committed no error." (Appendix C to the Petition for Certiorari, p. 28.)

ARGUMENT

I

The summary judgment was based on petitioner's failure to show any genuine factual issue as to the allegation of conspiracy.

In opposing the distributor-respondents' motion for summary judgment in the District Court, petitioner made no showing by affidavit or otherwise of any factual issue on its charge of conspiracy, but rested upon the bare allegations of conspiracy pleaded in its Amended Complaint.

This complete default in showing the existence of any genuine issue of fact compelled the entry of summary judgment against petitioner, under the clear mandate of Rule 56(e) of the Federal Rules of Civil Procedure, as amended in 1963, which in pertinent part provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, ***must set forth specific facts showing that there is a genuine issue for trial.*** If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added.)

In its unanimous decision affirming the summary judgment, the Court of Appeals cited Rule 56(e), and also *Dressler* v. *MV Sandpiper* (2d Cir.) 331 F. 2d 130, where the history of the recent amendment to Rule 56(e) was carefully reviewed, demonstrating that the amended Rule was specifically designed to preclude the possibility that bare allegations in a pleading could "stand in the way of granting an otherwise justified summary judgment * * *" (331 F. 2d at 132).

It is, therefore, abundantly clear from the decision of the District Court (finding "no genuine issue of fact involved herein", R. 93) and the Court of Appeals (expressly predicating its affirmance on a careful review of the record, and citing Rule 56(e), F. R. Civ. P.) that the determination of the Courts below rested on petitioner's utter failure to show the existence of any genuine factual issue on the alleged participation of the distributor-respondents in a conspiracy in violation of the antitrust laws—and *not* by virtue of the doctrine of *res judicata*—as petitioner would want this Honorable Court to assume.

Thus, completely ignoring its own default in even attempting to show a genuine factual issue—which is the

reason why summary judgment was entered—petitioner disingenuously asserts in this Court that the summary judgment was based on an improper application of the doctrine of *res judicata*. The falsity of this proposition is dramatized by petitioner's shift in this Court from the legal position which it had taken on its appeal in the Court of Appeals. In its brief in the Court below, petitioner represented to that Court that the "*Question Involved*" was "*whether plaintiff is bound by a judgment entered in another jurisdiction in a case prosecuted by an altogether different unrelated plaintiff, and involving substantially different issues of fact*". Respondent National Screen's answering brief in the Court of Appeals demonstrated the shocking inaccuracy in petitioner's representation of the "Question Involved", by quoting the above quoted admissions of petitioner's attorney (set forth in this brief, pp. 6-8, *supra*) to the effect that all the poster-renter cases present identical factual issues.

Faced with the irrefutable record of his own concessions that all of the poster-renter cases present the identical facts and legal theory and issues, petitioner's attorney has now abandoned his former contention that the *Lawlor* case involved "substantially different issues of fact", but attempts to argue in this Court that the "Questions Presented" include the question as to whether the Courts below had the right to determine this case by applying the principle of *res judicata*. The difficulty with petitioner's "Question" is that it rests upon a false premise. As we demonstrated, the Courts below did no such thing. The plain fact, as already shown (pp. 9-10, *supra*), is that the determinations of the District Court and the Court of Appeals were predicated on petitioner's failure to introduce, by affidavit or otherwise, any evidence from which the Court could discover the existence of a genuine issue of fact as to petitioner's claim of conspiracy. *Res judicata* was never urged by respondents in the Courts below, and petitioner's attempt to persuade this Honorable Court

that *res judicata* was the basis for decision in the Courts below, is completely contradicted by everything in the record, including the testimony of petitioner's director and part owner, that he knows of no facts indicating a conspiracy, and the admission of petitioner's attorney that he has no new evidence of any conspiracy other than that which all Courts in over a dozen cases have rejected as insufficient as a matter of law.

Petitioner quotes at length from a portion of District Judge Morgan's opinion (Petition, pp. 6-7), but ends the quotation without quoting this truly significant finding (R. 93):

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation.
>
> Consequently, it is the belief of this Court that the motion for summary judgment filed by the motion picture distributor defendants should be granted *as there appears to be no genuine issue of fact involved herein.*" (Emphasis added)

The absence of any genuine issue of fact, expressly found by the District Court and confirmed by the Court of Appeals' careful review of the record, not only warranted but compelled summary judgment under Rule 56(e), a determination which had nothing whatever to do with the doctrine of *res judicata*.

II

Petitioner's irrelevant contention that the *Lawlor* judgment rested solely on failure to prove injury is patently false.

Since *res judicata* is *not* the basis for the judgment which petitioner asks this Court to review, the petitioner's *second* "Question Presented" (p. 2) and the purported "analysis" of the *Lawlor* case set forth on pages 9-15 of the Petition are totally irrelevant to any issue now before this Court. But though respondents do not rely on the doctrine of *res judicata,* and petitioner's contentions respecting the *Lawlor* case have no bearing on whether respondents are entitled to summary judgment herein, we wish nevertheless to point out the shocking inaccuracy of petitioner's argument, to demonstrate the transparent insincerity of petitioner's position in this Court.

Petitioner's *second* "Question Presented" reads as follows (Petition, p. 2):

> "If the judgment in the earlier suit [referring to the *Lawlor* case] was entered *solely* on the ground that the plaintiff had failed to prove the fact of loss, can the judgment be used in a later suit as an adjudication that the defendants had not conspired to violate the federal antitrust laws?" (emphasis supplied)

Even the most cursory review of the 140 Findings of Fact and 12 Conclusions of Law entered by District Judge Kraft in the *Lawlor* case (which are part of the Record in this case) and the very meticulous and comprehensive opinion by the Court of Appeals in *Lawlor* (270 F. 2d 146, cert. den. 362 U. S. 922), completely refutes petitioner's statement that the judgment in defendants' favor against Mr. Anderson's clients in that case was "entered solely on the ground that the plaintiff had failed to prove the fact of loss."

Any doubt that the District Court specifically determined the absence of any antitrust violation by the motion picture distributor defendants in the *Lawlor* case is dispelled by the following "Conclusion of Law" entered by District Judge Kraft (R. 170):

> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Moreover, in the unanimous opinion of the Court of Appeals, affirming Judge Kraft's findings and conclusions, the following statement appears (270 F. 2d at 155):

> "One last aspect of this case deserves mention. In an effort to show a conspiracy, plaintiffs rely upon United States v. Paramount Pictures, Inc., 1948, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260, and Interstate Circuit, Inc. v. United States, 1939, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610, which hold that conspiracy may be established not only by express agreement but also by a showing of adherence to concerted action which has been contemplated or invited. Not only have the plaintiffs here failed in their proof of an 'arrangement,' 'plan,' or 'scheme' but the great weight of credible evidence clearly shows that the film companies, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task."

And if there were any need for further judicial confirmation of the obvious truth that the *Lawlor* judgment was *not* entered "solely on the ground that the plaintiff had failed to prove the fact of loss", the point is clearly made by District Judge Morgan in the instant case (R. 92), who quoted with approval the following statement by Judge Luongo in *Vogelstein* v. *National Screen et al.*, 204 F. Supp. 591, 596, aff'd 310 F. 2d 738, cert. den. 374 U. S. 840:

> "It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer."

In view of the foregoing quotations—all of which are from judicial decisions in cases where petitioner's present attorney, Mr. Anderson, appeared as counsel—petitioner's attempt to persuade this Court that the *Lawlor* decision was not "on the merits" on the issues of conspiracy and attempt to monopolize but was "entered solely" on plaintiff's failure to prove injury, is nothing short of an imposition upon this Court.

But as already pointed out, the judgments herein in the Courts below do not rest upon the doctrine of *res judicata*, and thus petitioner's characterization of the *Lawlor* case is both wholly irrelevant to the real issue presented and, in any event, patently inaccurate.

Petitioner's extensive quotation from prior decisions in *Lawlor* v. *National Screen*, 349 U. S. 322, and in the instant case, 305 F. 2d 647 (Petition, pages 17, 20) are wholly irrelevant on this application, since those decisions were rendered at preliminary stages of both the *Lawlor* case and this case. Subsequent developments in each case—in *Lawlor*, the subsequent trial (the result of which, in

favor of the respondents, this Court refused to review, 362 U. S. 922) and in the instant case, the granting of summary judgment—superceded the earlier decisions quoted by petitioner.

CONCLUSION

The decision of the District Court, unanimously affirmed by the Court of Appeals, reflects petitioner's total failure to present any evidence showing the existence of a genuine factual issue. The petition for certiorari should be denied.

Respectfully submitted,

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